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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOSHUA H. CRITTENDON,
Plaintiff,

v.
JOE LOMBARDO et al.,
Defendants.

Case No. 2:17-cv-01700-RFB-PAL
SCREENING ORDER

Plaintiff, who is an inmate in the custody of the Clark County Detention Center (“CCDC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis* and two motions for appointment of counsel. (ECF No. 1, 1-1, 8, 19). The Court now addresses the application to proceed *in forma pauperis*, screens Plaintiff’s civil rights complaint pursuant to 28 U.S.C. § 1915A, and addresses the remaining motions.

I. IN FORMA PAUPERIS APPLICATION

Before the Court is Plaintiff’s application to proceed *in forma pauperis*. (ECF No. 1). Based on the information regarding Plaintiff’s financial status, the Court finds that Plaintiff is not able to pay an initial installment payment toward the full filing fee pursuant to 28 U.S.C. § 1915. Plaintiff will, however, be required to make monthly payments toward the full \$350.00 filing fee when he has funds available.

II. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged violation was committed by a person acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d

1 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
2 allegations of material fact stated in the complaint, and the court construes them in the
3 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
4 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
5 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
6 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
7 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,
8 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
9 insufficient. *Id.*

10 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
11 that, because they are no more than mere conclusions, are not entitled to the assumption
12 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can
13 provide the framework of a complaint, they must be supported with factual allegations.”
14 *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity
15 and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*
16 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-
17 specific task that requires the reviewing court to draw on its judicial experience and
18 common sense.” *Id.*

19 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
20 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
21 includes claims based on legal conclusions that are untenable (e.g., claims against
22 defendants who are immune from suit or claims of infringement of a legal interest which
23 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
24 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
25 see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

26 27 **III. SCREENING OF COMPLAINT**

28 In the complaint, Plaintiff, a pretrial detainee, sues multiple defendants for events

1 that took place while Plaintiff was incarcerated at the Clark County Detention Center
2 (“CCDC”). (ECF No. 1-1 at 1, 4). Plaintiff sues Defendants Sheriff Joe Lombardo, SERT
3 Team Sergeant Rogers, Officer Torrez, Naphcare Supervisor Williamson, Officer
4 Sanches, Officer Brown, Naphcare Staff¹, and John Doe. (*Id.* at 2-4). Plaintiff alleges
5 three counts² and seeks declaratory judgment, injunctive relief, and monetary damages.
6 (*Id.* at 15, 23-26).

7 **A. Count I**

8 On November 15, 2015, Sanches told Plaintiff to “cuff up” because Plaintiff had a
9 visitor. (ECF No. 1-1 at 6). After Plaintiff cuffed up and the door opened, Sanches
10 grabbed Plaintiff’s shirt and directed Plaintiff to the stairs. (*Id.*) As they neared the stairs,
11 Plaintiff stopped to avoid getting pushed down the stairs. (*Id.*) Sanches interrupted the
12 stop as resistance and slammed Plaintiff to the ground. (*Id.*) Sanches put his knee on
13 the side of Plaintiff’s face and wrenched and twisted Plaintiff’s wrists. (*Id.*) Officer John
14 Doe asked Sanches what he was doing and said “to be easy.” (*Id.*) Sanches got on the
15 radio and called Sgt. Reynolds who punished Plaintiff for whatever Sanches had told him.
16 (*Id.*) Plaintiff missed his attorney visit and suffered from bruises and severe wrist
17 abrasions. (*Id.*) The officers harassed Plaintiff because he threatened to sue them for
18 opening his legal mail during a cell search. (*Id.*) Plaintiff alleges excessive force and a
19 state law claim for assault and battery against Sanches and John Doe. (*Id.* at 6-7, 19).

20 **i. Excessive Force**

21 In *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), the Supreme Court held that a
22 pretrial detainee states a claim for excessive force under the Fourteenth Amendment if:
23 (1) the defendant’s use of force was used purposely or knowingly, and (2) the force
24 purposely or knowingly used against the pretrial detainee was objectively unreasonable.
25 *Id.* at 2472-73.

26 ¹ The Court dismisses Defendant Naphcare Staff, without prejudice, from this
27 case. Plaintiff must identify the individual Naphcare employees who violated his rights.

28 ² Plaintiff appears to allege eight different claims from those three counts. (See
ECF No. 1-1 at 18-22).

1 The Court finds that Plaintiff states a colorable claim for excessive force. Based
2 on the allegations, Plaintiff stopped by the stairs to avoid being pushed down the stairs.
3 As a result, Sanches slammed Plaintiff to the ground, kned Plaintiff's face, and twisted
4 Plaintiff's wrists. For screening purposes, the force seems objectively unreasonable
5 given that Plaintiff was trying to avoid falling down the stairs. The excessive force claim
6 will proceed against Defendant Sanches.

7 **ii. Failure to Protect**

8 With respect to Officer John Doe, there are no allegations that he participated in
9 the force. However, it does appear that John Doe witnessed the force and did not do
10 anything to protect Plaintiff. A pretrial detainee states a claim for failure-to-protect against
11 an individual officer under the Fourteenth Amendment if: (1) the defendant made an
12 intentional decision with respect to the conditions under which the pretrial detainee was
13 confined; (2) those conditions put the pretrial detainee at substantial risk of suffering
14 serious harm; (3) the defendant did not take reasonable available measures to abate that
15 risk, even though a reasonable officer in the circumstances would have appreciated the
16 high degree of risk involved—making the consequences of the defendant's conduct
17 obvious; and (4) by not taking such measures, the defendant caused the pretrial
18 detainee's injuries. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016).

19 The Court finds that Plaintiff states a colorable claim against Defendant John Doe
20 for failure to protect. Based on the allegations, John Doe recognized that Sanches was
21 putting Plaintiff at risk of serious harm, questioned what Sanches was doing, and told
22 Sanches to take it easy. However, John Doe did not stop Sanches from using the force
23 against Plaintiff. This claim will proceed against John Doe when Plaintiff learns his
24 identity.³

25
26 ³ Although the use of "Doe" to identify a defendant is not favored, flexibility is
27 allowed in some cases where the identity of the parties will not be known prior to filing a
28 complaint but can subsequently be determined through discovery. *Gillespie v. Civiletti*,
629 F.2d 637, 642 (9th Cir. 1980). If the true identity of any of the Doe Defendant(s)
comes to light during discovery, Plaintiff may move to amend his complaint to assert
claims against the Doe Defendant(s) at that time.

1 **iii. State Law Claim**

2 The Court will permit the state law claim of assault and battery to proceed against
3 Defendant Sanches based on supplemental jurisdiction. See 28 U.S.C. § 1367(a) (stating
4 that “in any civil action of which the district courts have original jurisdiction, the district
5 courts shall have supplemental jurisdiction over all other claims that are so related to
6 claims in the action within such original jurisdiction that they form part of the same case
7 or controversy”).

8 **B. Count II**

9 In Count II, Plaintiff alleges the following: On November 16, 2016, Brown woke
10 Plaintiff up for medication. (ECF No. 1-1 at 8). Brown kept telling Plaintiff to open his
11 mouth, Plaintiff told Brown not to start with him, and Plaintiff commented about the sexual
12 allegations against Brown. (*Id.*) Brown responded, “Oh, alright, I’ll be back.” (*Id.*) Ten
13 minutes later, Brown returned and told Plaintiff to roll up his stuff because Plaintiff was
14 moving “to the nasty cell in the corner where [Plaintiff] can’t see the T.V.” (*Id.*) When
15 Plaintiff asked to speak to the sergeant, Brown responded, “Oh, that’s all I wanted to
16 hear.” (*Id.*) F

17 Plaintiff asked Sgt. Rogers why he was being moved. (*Id.*) Sgt. Rogers told
18 Plaintiff that if Plaintiff did not move then Plaintiff would be moved by force. (*Id.*) Sgt.
19 Rogers told Plaintiff that there would be no negotiating the move. (*Id.*) Plaintiff stated
20 that he had done nothing wrong and that Sanches and Brown were harassing him. (*Id.*)

21 Sgt. Rogers was in charge of the SERT Team. (*Id.*) The SERT Team went to
22 Plaintiff’s cell and yelled to him that if Plaintiff did not cuff up then they would use deadly
23 force against him. (*Id.* at 9). Plaintiff was traumatized from the day before and “froze up”
24 and did not comply. (*Id.*) Plaintiff told them that he would not fight or resist and to do
25 what they had to do. (*Id.*) The SERT Team sprayed chemicals in Plaintiff’s room which
26 caused Plaintiff to cough, choke, and spit up saliva. (*Id.*) The SERT Team sprayed
27 Plaintiff again. (*Id.*) While Plaintiff was choking, the SERT Team stuck a shotgun in the
28 room. (*Id.*) Plaintiff got scared and held a mattress against his body with his hand

1 exposed. (*Id.*) Torrez shot Plaintiff's hand. (*Id.*) The metal box that was supposed to
2 hold the rubber ball malfunctioned and clacked around Plaintiff's cell after accidentally
3 being ejected from the shotgun. (*Id.*) Plaintiff asked Torrez if the metal was supposed to
4 be shot out with the rubber ball and he responded, "hell no." (*Id.*) The malfunctioning
5 shot gun broke Plaintiff's finger. (*Id.*)

6 The SERT Team rushed into Plaintiff's cell while Plaintiff was lying face down with
7 his hands behind his back. (*Id.* at 10). Plaintiff felt a heavy weight on his back and could
8 not breathe from the chemical spray. (*Id.*) One of the SERT officers grabbed Plaintiff's
9 bloody, broken finger and twisted it. (*Id.*) Plaintiff yelled out in pain. (*Id.*) The SERT
10 officers took Plaintiff to a mental health unit where they stripped Plaintiff naked and took
11 the mattress from the room. (*Id.*) Plaintiff had nowhere to lie down. (*Id.*) Jail officials
12 rolled an x-ray machine into the cell and took an x-ray of Plaintiff's hand. (*Id.*) Plaintiff
13 asked for a doctor and to have the chemicals rinsed from his body. (*Id.*)

14 Jail officials left Plaintiff naked and bleeding in the cell for eight hours with an open
15 wound. (*Id.*) Jail officials took Plaintiff's pain medication away and did not permit Plaintiff
16 to see a doctor for two months. (*Id.*) When internal affairs came to speak to Plaintiff, Sgt.
17 Rogers and Torrez were there giving Plaintiff intimidating and threatening looks. (*Id.*)
18 Plaintiff was not able to take a shower and rinse the chemicals off for four days to a week.
19 (*Id.* at 11.)

20 A few hours after the x-rays, Sgt. Rogers informed Plaintiff that his finger was
21 broken. (*Id.*) When Plaintiff asked for a doctor to put a splint on his finger, Sgt. Rogers
22 told Plaintiff that certain medical treatment was not permitted in Plaintiff's cell unit. (*Id.*)
23 Plaintiff alleges claims for excessive force and delay of medical treatment. (*Id.* at 8, 19-
24 20).

25 i. Excessive Force

26 The Court finds that Plaintiff states a colorable claim for excessive force. See
27 Excessive Force, Part III.A.i. *supra*, for a discussion of the Fourteenth Amendment legal
28 standard for pretrial-detainee-excessive-force claims. Based on the allegations, Plaintiff

1 stated that he would not resist or fight, yet the SERT Team sprayed chemicals at Plaintiff,
2 shot him, and broke his finger. This claim will proceed against Defendants Rogers,
3 Torrez, Brown, and Doe SERT Team members (when Plaintiff learns their identities).

4 **ii. Serious Medical Needs**

5 A pretrial detainee's right to be free from punishment is grounded in the Due
6 Process Clause, but courts borrow from Eighth Amendment jurisprudence when
7 analyzing the rights of pretrial detainees. See *Pierce v. Cnty. of Orange*, 526 F.3d 1190,
8 1205 (9th Cir. 2008). Although the U.S. Supreme Court and the Ninth Circuit have started
9 to apply an objectively reasonable standard to determine whether a pretrial detainee's
10 rights have been violated, those courts have not fully addressed the new standard for
11 medical claims and pretrial detainees. See generally *Kingsley v. Hendrickson*, 135 S.Ct.
12 2466 (2015) (holding that an objectively reasonable standard applies to a pretrial
13 detainee's excessive force claims); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071
14 (9th Cir. 2016) (holding that an objectively reasonable standard applies to a pretrial
15 detainee's failure to protect claims). For screening purposes, the Court analyzes
16 Plaintiff's claims under the traditional Eighth Amendment deliberate indifference standard.
17 The Court finds that Plaintiff sufficiently states a colorable claim under the more stringent
18 subjective standard and, thus, states a colorable claim under any objective standard.

19 The Eighth Amendment prohibits the imposition of cruel and unusual punishment
20 and "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity,
21 and decency.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the
22 Eighth Amendment when he acts with "deliberate indifference" to the serious medical
23 needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). "To establish an
24 Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the
25 deprivation was serious enough to constitute cruel and unusual punishment—and a
26 subjective standard—deliberate indifference." *Snow v. McDaniel*, 681 F.3d 978, 985 (9th
27 Cir. 2012).

1 To establish the first prong, “the plaintiff must show a serious medical need by
2 demonstrating that failure to treat a prisoner’s condition could result in further significant
3 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091,
4 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference
5 prong, a plaintiff must show “(a) a purposeful act or failure to respond to a prisoner’s pain
6 or possible medical need and (b) harm caused by the indifference.” *Id.* “Indifference may
7 appear when prison officials deny, delay or intentionally interfere with medical treatment,
8 or it may be shown by the way in which prison physicians provide medical care.” *Id.*
9 (internal quotations omitted). When a prisoner alleges that delay of medical treatment
10 evinces deliberate indifference, the prisoner must show that the delay led to further injury.
11 *See Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985)
12 (holding that “mere delay of surgery, without more, is insufficient to state a claim of
13 deliberate medical indifference”).

14 The Court finds that Plaintiff states a colorable claim for deliberate indifference to
15 serious medical needs. Based on the allegations, Rogers knew that the shotgun had
16 broken Plaintiff’s finger after the x-ray but refused to get medical help for Plaintiff for two
17 months. Additionally, based on the allegations, Rogers did not permit Plaintiff to wash
18 the chemicals off of his body for four to seven days. This claim will proceed against
19 Defendant Rogers.

20 **C. Count III**

21 In Count III, Plaintiff alleges the following: Since November 16, 2016, Plaintiff has
22 been in constant pain and discomfort due to his crippled and deformed hand. (ECF No.
23 1-1 at 12). If Williamson and Rogers would have treated Plaintiff’s broken finger
24 immediately when they learned of the injury from the x-ray, Plaintiff would not be in pain.
25 (*Id.*) Two months later, an outside specialist told Plaintiff that he would suffer from arthritis
26 for the rest of his life and that it was too late for surgery because his finger had healed
27 broken. (*Id.* at 12-13). The specialist, an orthopedic doctor, told Plaintiff that it would be
28 unwise to re-break or re-set his finger because he had waited too long for it to be operated

1 on. (*Id.* at 13). Dr. Lopez, the CCDC doctor, told Plaintiff that Plaintiff should get a second
2 opinion because Dr. Lopez thought that Plaintiff's finger needed to be re-broke. (*Id.*) Jail
3 officials sent Plaintiff to the same specialist for a second opinion who, of course, gave the
4 same opinion. (*Id.*) Plaintiff continues to suffer in pain because jail officials took Plaintiff
5 off of pain medication without any warning or reason. (*Id.*)

6 After jail officials shot Plaintiff, they took Plaintiff to a cell and stripped him naked.
7 (*Id.* at 14). Jail officials kept Plaintiff in a cell covered with urine and feces for four days
8 while his finger bled. (*Id.*)

9 Lombardo was the sheriff. (*Id.* at 15). Plaintiff was an "involuntary recipient to
10 [Lombardo's] indirect participation through [third] party contract breach." (*Id.*) Plaintiff
11 argues that he is a third-party beneficiary to the contract between Naphcare and the jail.
12 (*Id.* at 14). Plaintiff alleges claims for serious medical needs, conditions of confinement,
13 supervisory liability, and a state law claim for negligence. (*Id.* at 12, 20-22).

14 **i. Serious Medical Needs**

15 The Court finds that Plaintiff states a colorable claim for serious medical needs.
16 See Serious Medical Needs, Part III.B.ii. *supra*, for a discussion of the legal standard for
17 pretrial detainees and serious medical needs claims. Based on the allegations,
18 Williamson and Rogers knew that Plaintiff's finger was broken on the day of the x-ray, yet
19 delayed providing Plaintiff any medical treatment for his broken finger until two months
20 later. Based on the allegations, Plaintiff's finger healed broken, he will suffer from arthritis
21 for the rest of his life, and he suffers in pain without any pain medication. This claim will
22 proceed against Defendants Williamson and Rogers.

23 **ii. Conditions of Confinement**

24 Although the U.S. Supreme Court and the Ninth Circuit have started to apply an
25 objectively reasonable standard to determine whether a pretrial detainee's rights have
26 been violated, those courts have not fully addressed the new standard for conditions of
27 confinement claims involving pretrial detainees. See generally *Kingsley v. Hendrickson*,
28 135 S.Ct. 2466 (2015) (holding that an objectively reasonable standard applies to a

1 pretrial detainee's excessive force claims); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060,
2 1071 (9th Cir. 2016) (holding that an objectively reasonable standard applies to a pretrial
3 detainee's failure to protect claims). For screening purposes, the Court analyzes
4 Plaintiff's claims under the traditional Eighth Amendment deliberate indifference standard.
5 The Court finds that Plaintiff sufficiently states a colorable claim under the more stringent
6 subjective standard and, thus, states a colorable claim under any objective standard.

7 The "treatment a prisoner receives in prison and the conditions under which he is
8 confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509
9 U.S. 25, 31 (1993). Conditions of confinement may, consistent with the Constitution, be
10 restrictive and harsh. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). However, "[p]rison
11 officials have a duty to ensure that prisoners are provided adequate shelter, food,
12 clothing, sanitation, medical care, and personal safety." *Johnson v. Lewis*, 217 F.3d 726,
13 731 (9th Cir. 2000). When determining whether the conditions of confinement meet the
14 objective prong of the Eighth Amendment analysis, the court must analyze each condition
15 separately to determine whether that specific condition violates the Eighth Amendment.
16 See *Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981). As to the subjective prong
17 of the Eighth Amendment analysis, prisoners must establish prison officials' "deliberate
18 indifference" to the unconstitutional conditions of confinement to establish an Eighth
19 Amendment violation. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

20 When considering the conditions of confinement, the court should consider the
21 amount of time to which the prisoner was subjected to the condition. *Hearns v. Terhune*,
22 413 F.3d 1036, 1042 (9th Cir. 2005). "[S]ubjection of a prisoner to lack of sanitation that
23 is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth
24 Amendment." *Anderson v. Cnty. of Kern*, 45 F.3d 1310, 1314, *opinion amended on denial*
25 *of reh'g*, 75 F.3d 448 (9th Cir. 1995).

26 The Court finds that Plaintiff states a colorable claim for conditions of confinement
27 based on sanitation. Based on the allegations, Rogers left Plaintiff in a cell that was
28 covered in feces and urine for four days while Plaintiff had a bleeding and open wound

1 with his broken finger. The Court finds that, based on the allegations, four days in a feces
2 covered cell with an open, bleeding wound arguably violates the constitution. This claim
3 will proceed against Defendant Rogers.

4 **iii. Supervisory Liability**

5 To the extent that Plaintiff is attempting to hold Lombardo liable for his officers'
6 constitutional violations, the Court dismisses the claim, without prejudice. There are no
7 allegations that Lombardo knew of or participated in the excessive force, deprivation of
8 medical care, or conditions of confinement violations. See *Taylor v. List*, 880 F.2d 1040,
9 1045 (9th Cir. 1989) (holding that “[a] supervisor is only liable for constitutional violations
10 of his subordinates if the supervisor participated in or directed the violations, or knew of
11 the violations and failed to act to prevent them. There is no respondeat superior liability
12 under [§]1983”).

13 Additionally, to the extent that Plaintiff is alleging he is a third-party beneficiary to
14 a contract, this breach-of-contract claim fails. Generally, “[t]o sue as a third-party
15 beneficiary of a contract, the third party must show that the contract reflects the express
16 or implied intention of the parties to the contract to benefit the third party.” *Klamath Water*
17 *Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999), *opinion*
18 *amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000). However, “[p]arties that
19 benefit from a government contract are generally assumed to be incidental beneficiaries,
20 and may not enforce the contract absent a clear intent to the contrary.” *Id.* “Government
21 contracts often benefit the public, but individual members of the public are treated as
22 incidental beneficiaries unless a different intention is manifested.” *Id.*

23 The Court finds that Plaintiff fails to state a colorable claim. The Court finds that
24 Plaintiff would be no more than an incidental beneficiary of any alleged contract between
25 Naphcare and the CCDC and would not be able to show a clear intent to the contrary.
26 The Court dismisses this claim, with prejudice, as amendment would be futile.

27 **iv. State Law Claim**

28 The state law claim for medical negligence against Defendant Williamson may

1 proceed based on supplemental jurisdiction. See 28 U.S.C. § 1367(a) (stating that “in
2 any civil action of which the district courts have original jurisdiction, the district courts shall
3 have supplemental jurisdiction over all other claims that are so related to claims in the
4 action within such original jurisdiction that they form part of the same case or
5 controversy”).

6 7 **IV. MOTIONS FOR APPOINTMENT OF COUNSEL**

8 Plaintiff has filed two motions for appointment of counsel. (ECF No. 8, 19). A
9 litigant does not have a constitutional right to appointed counsel in 42 U.S.C. § 1983 civil
10 rights claims. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). Pursuant to 28
11 U.S.C. § 1915(e)(1), “[t]he court may request an attorney to represent any person unable
12 to afford counsel.” However, the court will appoint counsel for indigent civil litigants only
13 in “exceptional circumstances.” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (§
14 1983 action). “When determining whether ‘exceptional circumstances’ exist, a court must
15 consider ‘the likelihood of success on the merits as well as the ability of the petitioner to
16 articulate his claims *pro se* in light of the complexity of the legal issues involved.” *Id.*
17 “Neither of these considerations is dispositive and instead must be viewed together.” *Id.*
18 In the instant case, the Court does not find exceptional circumstances that warrant the
19 appointment of counsel at this stage of the litigation. The Court denies the motions for
20 appointment of counsel at this time without prejudice.

21 The Court, however, will consider a renewed motion for the appointment of counsel
22 if Plaintiff’s claims survive summary judgment.

23 24 **V. CONCLUSION**

25 For the foregoing reasons,

26 **IT IS ORDERED** that Plaintiff’s application to proceed *in forma pauperis* (ECF No.
27 1) without having to prepay the full filing fee is **GRANTED**. Plaintiff shall **not** be required
28 to pay an initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant

1 to 28 U.S.C. § 1915, as amended by the Prisoner Litigation Reform Act. The movant
2 herein is permitted to maintain this action to conclusion without the necessity of
3 prepayment of fees or costs or the giving of security therefor. This order granting *in forma*
4 *pauperis* status shall not extend to the issuance and/or service of subpoenas at
5 government expense.

6 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915(b)(2), the Clark
7 County Detention Center shall pay to the Clerk of the United States District Court, District
8 of Nevada, 20% of the preceding month's deposits to the account of **Joshua H.**
9 **Crittendon, #7511692** (in months that the account exceeds \$10.00) until the full \$350.00
10 filing fee has been paid for this action. If Plaintiff should be transferred and become under
11 the care of the Nevada Department of Corrections, the CCDC Accounting Supervisor is
12 directed to send a copy of this order to the attention of the Chief of Inmate Services for
13 the Nevada Department of Corrections, P.O. Box 7011, Carson City, NV 89702, indicating
14 the amount that Plaintiff has paid toward his filing fee, so that funds may continue to be
15 deducted from Plaintiff's account. The Clerk shall send a copy of this order to the **CCDC**
16 **Accounting Supervisor, 330 S. Casino Center Blvd., Las Vegas, NV 89101.**

17 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
18 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended
19 by the Prisoner Litigation Reform Act.

20 **IT IS FURTHER ORDERED** that the Clerk of the Court shall file the complaint (ECF
21 No. 1-1).

22 **IT IS FURTHER ORDERED** that the portion of Count I, alleging excessive force,
23 will proceed against Defendant Sanches. The portion of Count I, alleging failure to
24 protect, will proceed against John Doe when Plaintiff learns his identity. The portion of
25 Count I, alleging state law claims, will proceed against Defendant Sanches based on
26 supplemental jurisdiction.

27 **IT IS FURTHER ORDERED** that the portion of Count II, alleging excessive force,
28 will proceed against Defendants Rogers, Torrez, Brown, and Doe SERT team members

1 (when Plaintiff learns their identities). The portion of Count II, alleging serious medical
2 needs, will proceed against Defendant Rogers.

3 **IT IS FURTHER ORDERED** that the portion of Count III, alleging serious medical
4 needs, will proceed against Defendants Williamson and Rogers. The portion of Count III,
5 alleging conditions of confinement, will proceed against Defendant Rogers. The portion
6 of Count III, alleging supervisory liability, is dismissed against Defendant Lombardo
7 without prejudice. The portion of Count III, alleging breach of contract, is dismissed, with
8 prejudice, against Defendant Lombardo. The portion of Count III, alleging a state law
9 claim for medical negligence, may proceed against Defendant Williamson based on
10 supplemental jurisdiction.

11 **IT IS FURTHER ORDERED** that Defendant Naphcare Staff is dismissed, without
12 prejudice, from the case.

13 **IT IS FURTHER ORDERED** that the motions for appointment of counsel (ECF No.
14 8, 19) are denied without prejudice.

15 **IT IS FURTHER ORDERED** that the Clerk of Court **SHALL ISSUE** summonses for
16 Defendants Rogers, Torrez, Williamson, Sanches, and Brown, **AND DELIVER THE**
17 **SAME**, to the U.S. Marshal for service. The Clerk **SHALL SEND** to Plaintiff **five (5)** USM-
18 285 forms. The Clerk also **SHALL SEND** a copy of the complaint (ECF No. 1-1) and a
19 copy of this order to the U.S. Marshal for service on Defendant(s). Plaintiff shall have
20 **thirty (30) days** within which to furnish to the U.S. Marshal the required USM-285 forms
21 with relevant information as to each Defendant on each form. Within **twenty (20) days**
22 after receiving from the U.S. Marshal a copy of the USM-285 forms showing whether
23 service has been accomplished, Plaintiff must file a notice with the Court identifying which
24 Defendant(s) were served and which were not served, if any. If Plaintiff wishes to have
25 service again attempted on an unserved Defendant(s), then a motion must be filed with
26 the Court identifying the unserved Defendant(s) and specifying a more detailed name
27 and/or address for said Defendant(s), or whether some other manner of service should
28 be attempted.

1 **IT IS FURTHER ORDERED** that henceforth, Plaintiff shall serve upon Defendants
2 or, if appearance has been entered by counsel, upon the attorney(s), a copy of every
3 pleading, motion or other document submitted for consideration by the Court. Plaintiff
4 shall include with the original paper submitted for filing a certificate stating the date that a
5 true and correct copy of the document was mailed to the Defendants or counsel for the
6 Defendants. The Court may disregard any paper received by a district judge or magistrate
7 judge which has not been filed with the clerk, and any paper received by a district judge,
8 magistrate judge or the clerk which fails to include a certificate of service.

9 **IT IS FURTHER ORDERED** that ***Defendant Williamson (Naphcare Director)***
10 **SHALL** provide the Plaintiff regular (**weekly for at least one to two hours**) access to his
11 **ENTIRE** medical file throughout the pendency of this litigation. Failure to provide such
12 access may lead to sanctions, *including monetary sanctions and up to case-dispositive*
13 *sanctions*.

14 **IT IS FURTHER ORDERED** that, given this Order, the following Motions [20, 21 24
15 and 26] are DISMISSED without prejudice to being filed after a status or motion hearing
16 in this case.

17 **IT IS FURTHER ORDERED** that Plaintiff shall NOT file any further motions without
18 leave of the Court except for motions involving direct threats to his safety or a serious
19 potentially life-threatening medical condition.

20 **IT IS FURTHER ORDERED** that a ***hearing*** is set on Plaintiff's Motion [20] for
21 Preliminary Injunction for **January 11, 2018 at 11:30 a.m. in courtroom 7D. Counsel**
22 ***for Defendants Joseph Lombardo and Defendant Williamson, who have previously***
23 ***entered special appearances, are ORDERED to appear.***

24 **IT IS FURTHER ORDERED** that counsel for Defendant Joseph Lombardo will
25 ensure that Plaintiff receives a copy of this Order by **December 30, 2017**.

26 DATED: December 28, 2017.

27
28 

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE